COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Consolidated Arbitrations	D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94
Performance Assurance Plan	D.T.E. 03-50

AT&T's INITIAL COMMENTS ON CONSIDERED ELIMINATION OF CONSOLIDATED ARBITRATIONS PERFORMANCE STANDARDS

Jeffrey F. Jones
Kenneth W. Salinger
Julia Green
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
617.239.0100
jgreen@palmerdodge.com

Jay E. Gruber
AT&T Communications of New England, Inc.
99 Bedford Street, 4th Floor
Boston, MA 02111
617.574.3149
jegruber@lga.att.com

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Introduction.

By memorandum dated January 22, 2004, the Department of Telecommunications and Energy (the "Department") on its own motion asked parties to D.P.U./D.T.E. 96-73/74, 96-75, 98-80/81, 96-83, 96-94 ("*Consolidated Arbitrations*"), and other interested parties, to comment on elimination of the performance standards to which Verizon Massachusetts ("Verizon") is bound under its interconnection agreements ("ICAs") with CLECs. Specifically, the Department indicated in its January 22 memorandum that it is considering terminating Verizon's obligations under the *Consolidated Arbitrations* in favor of the standards encompassed in the Department's Carrier to Carrier ("C2C") Guidelines and the Performance Assurance Plan ("PAP").

AT&T Communications of New England, Inc. ("AT&T") respectfully opposes the Department's elimination of Verizon's performance standards obligations in the AT&T-Verizon interconnection agreement ("ICA") established in the *Consolidated Arbitrations* docket. AT&T believes that there are strong reasons to maintain a separate set of performance standards and remedies under the *Consolidated Arbitrations* plan.

First, there are legal impediments to the Department eliminating the performance standards under the *Consolidated Arbitrations*. Relieving Verizon of its obligations without a hearing and examination of the facts would constitute a violation of the due process and contract rights of CLECs who have retained their agreements with Verizon under the *Consolidated Arbitrations* performance standards, regardless of whether or not they have adopted the PAP as well. Finally, any attempt to modify the agreements without a change of circumstances, or new evidence considered and tested in an adjudicatory process, constitutes a violation of the "reasoned consistency" doctrine. It also constitutes a reconsideration of the decision reached in the *Consolidated Arbitrations* and reaffirmed in D.T.E. 99-271. As such, it is against Department policy where, as here, there are no extraordinary circumstances urging reevaluation

of a prior considered decision. For these reasons, set forth in more detail below, AT&T strongly urges the Department not to seek to revoke the performance standards ordered by it in the *Consolidated Arbitrations*.

Second, the existence of a separate set of performance metrics and remedies codified in its individual interconnection agreement ("ICA") is important to AT&T. The right to Verizon performance remedies under the ICA constitutes a legally enforceable obligation of Verizon that cannot be modified by the independent and unilateral actions of third parties. Unlike the contract rights that AT&T has in its ICA with Verizon, AT&T's rights to performance penalties under the PAP are subject to changes that are made by industry working groups and decisions of the Department that are not subject to due process requirements.

Argument.

I. AS A MATTER OF LAW THE DEPARTMENT MAY NOT ELIMINATE CONTRACT RIGHTS WITHOUT FURTHER PROCESS.

A. The Parties To The *Consolidated Arbitrations* Are Entitled To "Reasoned Consistency" In Departmental Decision Making.

The Supreme Judicial Court has held that "[a] party to a proceeding before a regulatory agency. . .has a right to expect and obtain reasoned consistency in the agency's decisions." *Boston Gas Co.* v. *Dept. of Public Utilities*, 367 Mass. 92, 104, 324 N.E.2d 372, 379 (1975). In a series of decisions, the Department has established and reaffirmed the right of AT&T and other CLECs to remedies for Verizon's performance failures as established in the *Consolidated Arbitrations*. The Department further reaffirmed those CLEC contract rights even after the Department established alternative remedies under the PAP. If the Department eliminates Verizon's obligations in the AT&T-Verizon ICA as established in the *Consolidated Arbitrations*, its decision will fall short of "reasoned consistency." Although the Department asks in its

memorandum whether there are strong reasons for maintaining the performance standards and remedies under the *Consolidated Arbitrations*, the appropriate legal standard is whether there are strong reasons for eliminating them. The Department in its reasoned decisions has already found strong reasons for maintaining them. If the standards and remedies are to be eliminated, there must be strong reasons that have arisen subsequently, before the Department may lawfully reverse its decision. In the absence of strong reasons for eliminating them, Department's elimination of Verizon's obligations under the *Consolidated Arbitrations* will constitute a violation of the reasoned consistency doctrine.

In *Boston Gas*, after three decisions in which the Department had allowed the Company to include in its rates an amount necessary to recover the net amount of unamortized retired plant, the Department in a subsequent decision concluded that such amounts should be excluded from rates. The *Boston Gas* Court noted that the Department had issued a series of decisions repeatedly applying a rule allowing such unamortized amounts to be included in rates and that it provided no reasoning or new evidence indicating any reason that a different rule should be applied. 367 Mass. 92, 101. The Department then stated,

> Whatever rule the Department may ultimately choose to follow on the question whether unamortized retired plant is to be included in the rate base, it should apply the same rule consistently to all utility companies subject to its regulatory authority. However, if, after claiming to have adopted a rule excluding such plant from the rate base, the Department knowingly and intentionally includes such plant of a particular company in its rate base, that company should not thereafter be subject to erratic changes in treatment every time the inclusion or exclusion of that item of plant may affect rate action sought by the company. *A party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions.*

367 Mass. 92, 104 (emphasis added). While noting that a Department's decision does not become irreversible in the same manner as a judicial decision does, the Department went on to

say that "neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time it is presented." *Id*.

This case is no different from *Boston Gas*. The *Consolidated Arbitrations* was a complicated proceeding involving 4 phases in which many obligations among many different parties were considered and decided. Early on in the proceedings, the Department emphasized the importance of a liquidated damages provision designed to provide an economic incentive for Verizon (then NYNEX and later Bell Atlantic) to provide parity in service to CLECs.

> As we have stated in our Order on Phase 1, there is clearly an incentive for an ILEC to provide lower quality service to a competing carrier and to that carrier's customers than it provides to itself and its customers. See Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 1), at 19-20 (1996). NYNEX's argument with regard to this incentive simply strains credulity.
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> Absent clear service standards and equally clear penalties for NYNEX's failure to meet such standards, the purposes of the Act would be in jeopardy. We agree with TCG that a liquidated damages provision in the interconnection agreements would provide a useful self-enforcement mechanism (TCG Reply Brief at 5).
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> We must, in carrying out [the task of determining contractual rights, including liquidated damages provisions], determine whether certain contractual conditions are consistent with that Act and are necessary to achieve the goals Congress has set forth. As we have stated, liquidated damages are necessary and consistent with the Act, and we are therefore empowered to order their inclusion in the interconnection agreements.

Consolidated Arbitrations, Phase 3 Order (December 4, 1996), at 25-26. In a series of further decisions, the Department implemented performance metrics, standards and remedies based on an evidentiary record and argument, which related the amount of the remedies to the type and level of the inadequate performance. *See Consolidated Arbitrations* Phase 3 Order at 21-27; Phase 3-B Order at 22; Phase 3-E Order at 2, n.4. In these decisions and orders, the Department

emphasized that Verizon payments for failure to meet performance standards had to be "sufficiently high" to provide a real financial incentive for Verizon to provide quality service at a time when CLECs were entering the local market. *See* Phase 3B Order at 27. The Department determined the level of remedies on that basis.

As in *Boston Gas*, in this instance the Department reaffirmed in a later proceeding its findings and ruling in the *Consolidated Arbitrations* about the necessity of liquidated damages. In D.T.E. 99-271, the Department restated that the liquidated damages provisions contained in interconnection agreements between Verizon and CLECs were critical to ensure parity of service. In fact, in its initial order in D.T.E. 99-271, the Department ensured that CLECs continued to enjoy the protections of the liquidated damages provisions in their contracts by finding that CLECs should recover the higher of the remedies between the PAP and the ICA performance standards when Verizon failed to perform satisfactorily. *See* D.T.E. 99-271, at 30. Then, in an order on AT&T's motion for reconsideration in D.T.E. 99-271, the Department *again* reaffirmed its position that CLECs should receive the amounts due them under their ICAs, by reiterating its finding that CLECs should receive the higher of the penalties due under the PAP and under the *Consolidation Arbitration* metrics. D.T.E. 99-271 (November 21, 2000), at 13. The Department stated, "This provision is fair to both VZ-MA and CLECs." *Id*.

There is no evidence of any change of facts or circumstances since the Department's decisions in D.T.E. 99-271 in which it reaffirmed the right of CLECs to remedies payments under their ICAs that would warrant the elimination of contract rights established in an adjudicatory proceeding. Nor, in the absence of due process, could there be competent evidence of a change in circumstance sufficient to take away the adjudicated rights of CLECs. Under the reasoned consistency doctrine, the Department may not eliminate the CLEC contract rights it has

established and reaffirmed over many decisions on the basis of the "record" to date. If the liquidated damages provision was "fair to both VZ-MA and CLECs" when the Department adopted the PAP, there is no reason why it is not still fair today.

B. Under the Administrative Procedures Act, The Department May Not Revoke A Prior Decision Made In An Adjudicatory Proceeding Without Opportunity For A Hearing To Reexamine The Facts At Issue.

The Massachusetts State Administrative Procedure Act defines an "adjudicatory proceeding" as "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." G.L. c. 30A §1(1). The generally accepted standard is that an agency engages in quasi-judicial activity when it adjudicates the rights and interests of particular persons based on specific facts. *See* 38 Mass. Prac. Administrative Law & Practice § 371. Under the Administrative Procedures Act, when the rights of specific named parties are being determined, such parties have a right to a hearing and "to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence." G.L. c. 30A, § 11(3).

Clearly, if the Department were to eliminate the contract rights of the CLECs that are parties to the interconnection agreements that resulted from the *Consolidated Arbitrations*, the Department would be affecting "the legal rights, duties or privileges of specifically named persons." As a result, under Chapter 30A, each CLEC would have a right to a hearing and all the other protections of due process. Accordingly, the Department cannot make a decision to eliminate the contract right of CLECs without first holding a hearing at which new facts are presented, and at which the parties have the opportunity to present evidence and cross-examine witnesses.

C. A Department Reconsideration of Its Prior Rulings Affirming The Contract Right Of CLECs To Liquidated Damages Notwithstanding The PAP Would Violate The Department's Precedent Regarding Reconsideration Of Its Orders.

The Department has a well-settled policy on reconsideration: "reconsideration. . .is granted only when extraordinary circumstances dictate that the court take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation." *Rhythms Links, Inc.*, D.T.E. 99-271 at 3 (2000); *North Attleboro Gas Company*, D.P.U. 94-130-B at 2 (1995); *Boston Edison Company*, D.P.U. 90-270-A at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 558-A at 2 (1987). A party moving for reconsideration must bring to light previously unknown or undisclosed material facts and not simply reargue issues considered and decided in the main case. *Rhythms Links, Inc.*, D.T.E. 99-271 at 3 (2000); *Commonwealth Electric Co.*, D.P.U. 92-3C-1A at 3-6 (1995); *Boston Edison Company*, D.P.U. 90-270-A at 3 (1991); *Boston Edison Company*, D.P.U. 1350-A at 4 (1983).

As we have stated and shown above, there are no extraordinary circumstances here that compel the Department to reconsider decisions it has already made and reaffirmed several times. made years ago. No person has come forward with any facts, much less, previously unknown facts, that would warrant reconsideration of the Department's prior orders. The Department should not violate its own policy against reconsideration in the absence of a mistake or previously unknown evidence coming to light.

II. BECAUSE THE PERFORMANCE STANDARDS AND PENALTIES UNDER THE PAP ARE NOT SUBJECT TO THE DUE PROCESS PROTECTIONS THAT APPLY TO CLEC RIGHTS UNDER THEIR ICAS, THE DEPARTMENT SHOULD NOT SEEK TO ELIMINATE CLEC CONTRACT RIGHTS.

In its decision approving Verizon's PAP in D.T.E. 99-271, the Department was careful to make clear that adoption of the PAP did not require due process because the Department was not

disturbing the due process and contract rights of CLECs under the *Consolidated Arbitrations*. The Department stated:

> [T]he Carrier-to-Carrier Performance Guidelines and the PAP adopted in this Order are not replacements for the *Consolidated Arbitrations* performance standards and credits; therefore, there is no reason to establish an adjudicatory process in order to protect CLECs' due process, contract, and statutory rights, as AT&T contends (see AT&T Motion at 8). Verizon will continue to comply with the requirements of Phase 3 in the *Consolidated Arbitrations*.

D.T.E. 99-271 (September 5, 2000), at 3. The Department went on in that order to provide the CLECs with an option of choosing the higher of the *Consolidated Arbitrations* or the PAP penalties on a monthly basis. *Id. See also, id.,* at 29.

As it has turned out, the penalties under the PAP have been generally higher than those under the ICAs adopted in the *Consolidated Arbitrations*. ***In this instance***, the results of the adoption of the PAP have been beneficial because the higher penalty payments under the PAP have had a greater incentive on Verizon to improve its performance than the lower penalty amounts under the ICAs. However, those higher payments and the correspondingly higher incentives for Verizon good performance under the PAP are subject to review and revision without any due process protections whatsoever. Just as the Department adopted the PAP in a proceeding that afforded no due process protection, it can change the PAP in a similar fashion. Moreover, the PAP incorporates ever-changing C2C metrics that are modified in industry working groups. It is important to AT&T that it has legally enforceable performance guarantees from Verizon that are relevant to AT&T's business needs. The PAP can always be changed by the Department or the "industry," which of course may have concerns different from those of AT&T. Only an enforceable contract right provides that protection to AT&T.

In sum, while the PAP may provide higher penalities, and thus greater financial incentive for Verizon good performance now, the PAP may be changed in ways adverse to AT&T'

interests, and AT&T would have no legal standing to protest. AT&T contract rights, however, are subject to due process protection and may not be so easily changed.

Conclusion.

For the foregoing reasons, AT&T respectfully submits that (1) a unilateral elimination by the Department of the performance standards established in the *Consolidated Arbitrations* would be contrary to law, and (2) because the PAP can be changed in ways adverse to any specific CLEC's interest and that CLEC would have no legal standing to protest, independent legally enforceable CLEC rights to penalty payments are important to protect CLECs' unique business interests.

Respectfully Submitted,

AT&T COMMUNCTIONS OF NEW ENGLAND, INC.

By its attorneys,

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Jeffrey F. Jones
Kenneth W. Salinger
Julia Green
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
617.239.0100
jgreen@palmerdodge.com

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AT&T Communications of New England, Inc.
99 Bedford Street, 4th Floor
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